



1 to Federal Rule of Appellate Procedure 35, he was unable to file a  
2 petition for a panel rehearing pursuant to Federal Rule of  
3 Appellate Procedure 40, he was unable to file a writ of certiorari  
4 to the United States Supreme Court, and he was unable to petition  
5 in "State/Federal District Court to show 'actual innocence'" after  
6 the alleged destruction of his legal files. The defendants filed a  
7 motion to dismiss plaintiff's complaint for failure to state a  
8 claim upon which relief may be granted because the plaintiff was  
9 unable to show actual injury. The report and recommendation states  
10 that plaintiff does not have a constitutional right of access to  
11 the courts to appeal the denial of his *habeas* petition, the Ninth  
12 Circuit did not grant plaintiff leave to file a second *habeas*  
13 petition, and the plaintiff has failed to allege an actual injury  
14 required to state an access to courts claim.

15 The court has considered the pleadings and memoranda of the  
16 parties and other relevant matters of record and has made a review  
17 and determination in accordance with the requirements of 28 U.S.C.  
18 § 636 and applicable case law, and good cause appearing, the court  
19 hereby ADOPTS AND ACCEPTS the report and recommendation of the  
20 United States Magistrate Judge (#29). Accordingly, the defendants'  
21 motion to dismiss (#11) is GRANTED.

22 DATED: This 15th day of June, 2011.

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24 UNITED STATES DISTRICT JUDGE  
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